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KERAJAAN NEGERI SELANGOR & ANOR v. BERJAYA LAND BHD & ORS

COURT OF APPEAL, PUTRAJAYA
LEE SWEE SENG JCA
CHE MOHD RUZIMA GHAZALI JCA
B AHMAD ZAIDI IBRAHIM JCA
[CIVIL APPEAL NO: B-01(A)-481-12-2017]
18 OCTOBER 2022

C **Abstract** – *An application for judicial review may lie against any decision wherein one is adversely affected by the decision, action or omission in relation to the exercise of the public duty or function. The remedy of an applicant, aggrieved by the decision of the local planning authority, lies in an appeal to the Appeal Board set up under s. 36 of the Town and Country Planning Act 1976. The decision of the local* D *planning authority itself is not amenable to judicial review for it is not a final decision binding on all the parties.*

E ***ADMINISTRATIVE LAW:*** *Judicial review – State authority – Local planning authority – 'Decision' pertaining to application for planning approval – Whether final decision – Whether binding on all parties – Whether exhausted appeal to Appeal Board – Whether amenable to judicial review – Town and Country Planning Act 1976, s. 36(13)*

F ***CONTRACT:*** *Agreement – Sale and purchase agreement – Planning approval for proposed development and relocation of Selangor Turf Club Equestrian and Sports Centre – Approval granted subject to conditions – Whether applicant informed of conditions – Whether applicant complied with requirement to resubmit amended concept plan to local planning authority – Whether respondents could not have legitimate expectation upon expiry of approval – Town and Country Planning Act 1976, s. 21(5)*

G Selangor Turf Club ('STC'), a horse racing club, having decided to relocate its premises, entered into a sale and purchase agreement ('SPA') with the third respondent, Selat Makmur Sdn Bhd ('SMSB'), a wholly owned company by the first respondent, Berjaya Land Bhd ('BLB'), for the sale of H the Sungai Besi land. As part of the dealings, SMSB covenanted to relocate Selangor Turf Club Equestrian and Sports Centre ('STC ESC') to Bukit Tagar land. The proposed relocation of the STC ESC would form part of a larger development, termed Berjaya City development, comprising of mixed development of industrial lots and residential areas. Accordingly, the second I respondent, Berjaya City Sdn Bhd ('BSCB'), submitted an application under s. 21 of the Town and Country Planning Act 1976 ('TCPA') for planning permission to Majlis Daerah Hulu Selangor and to Director of the Town and

Country Planning Department ('TCPD') for its approval for the proposed amendment to the zoning plan for Berjaya City Development. The concept plan proposal for the Berjaya City development which included the proposed relocation of the STC ESC was tabled at the National Physical Planning Council ('NPPC'), where approval was given subject to certain conditions, *inter alia*, horse racing activities were strictly not allowed in the proposed Berjaya City development. *Via* a letter dated 11 February 2008, the Director of the TCPD conveyed to BLB the outcome of the State Planning Committee's ('SPC') meeting and instructed BLB to resubmit the latest amended concept plan for Berjaya City development to the TCPD for approval. Subsequently, upon the application by the respondents, State Executive Council (State Exco) in a meeting decided BLB had to implement the industrial and business scheme in the Berjaya City development first before the proposed relocation of the STC ESC could be retabled for consideration. As a follow up, Unit Perancang Ekonomi Negeri (UPEN) wrote a letter dated 7 July 2011 to BLB to inform the State Exco's decision. Thereafter the respondents sent a number of correspondences to seek assistance to get the proposed relocation of the STC ESC re-tabled for approval including to His Royal Highness the Sultan of Selangor and the Menteri Besar's office. The matter was then referred to the State Legal Advisor's office but was informed on 29 February 2016 that no meeting could be fixed as there was no 'clear executive direction' from the State Government of Selangor. Consequent to the 'decision' in the State Legal Advisor's letter of 29 February 2016, the respondents commenced a judicial review against the appellants. The High Court allowed the respondents' application, having found that the respondents had a legitimate expectation that the Berjaya City development including the proposed relocation of the STC ESC would be re-tabled and approved for implementation. The failure by the appellants to honour this expectation had resulted in unfairness to the respondents and amounted to abuse of power.

Held (allowing appeal with costs)
Per Che Mohd Ruzima Ghazali JCA delivering the judgment of the court:

(1) At all material times, the approval of the Berjaya City development at Bukit Tagar Lands was on condition that there was to be no horse racing activities allowed in the proposed development area. The respondents were well informed of the conditions imposed by NPPC on the Berjaya City development, in particular, the proposed relocation of the STC ESC. The respondents were also notified about the requirement to resubmit the amended concept plan of the Berjaya City development to the local planning authority for the purpose of re-tabling by the SPC to the NPPC for consideration if they wish to pursue the proposal of the relocation for the STC ESC. (paras 34 & 35)

(2) Legitimate expectations could not and should not override the express statutory provisions stipulated under the law, in this case, the TCPA. The respondents did not comply with the directions from the Director of the TCPD to resubmit the latest concept plan to the local planning authority for approval. Based on the deeming provision under sub-s. 21(5), the approval in the letter should have expired. The appellants could not be said to have sat on the re-tabling the approval application to SPC or to NPPC, since there was no such application to begin with. Therefore, the respondents could not have any legitimate expectation that the appellants would be obliged or be under public duty to act in their favour. (paras 38, 40 & 41)

(3) The High Court Order had effectively approved the Berjaya City development by circumventing the TCPA. The High Court Order clearly showed that the judge had stepped into the shoes of the executive in approving the development defying all requirements, including the mandatory procedural requirements, and processes spelt out under ss. 21, 21A, 21B and 21C of the TCPA. The declaration order, that allowed the respondents to continue with the Berjaya City development and the Equestrian Centre, had the effect of ousting the statutory powers of the local planning authority to evaluate and to make decision on the respondents' planning permission application. It removed the right of the relevant government departments and agencies to give comments on the proposed development. It also defied the right of objection to the neighbouring land owner to the development as prescribed under sub-s. 21(6) and (7) of the TCPA. Hence, the High Court Order should not be allowed to stand and had to be set aside *ex debito justitiae*. (paras 43 & 44)

(4) The State Exco had decided that the respondents had to implement the industrial and business scheme in the Berjaya City development first before the proposed relocation of STC ESC could be reconsidered. Under the law, the burden is on the respondents and not the appellants to make an application for planning approval in order to move the local planning authority to take further steps to consider the application. There was no reason to assume that all the requirements stipulated under the law had been superseded by the UPEN's letter dated 7 July 2011. Having not submitted any amendment plan to the local planning authorities according to sub-s. 21(4) of the TCPA after their planning permission was approved with conditions in year 2008, the respondents were hoping to shift their obligation imposed under the law to the appellants. (paras 48-50)

(5) An appeal against the decision of the local planning authority is a creature of statute and any remedy sought by the aggrieved party will have to lie according to the right given under the statute. When no appeal lies from a decision by local planning authority, judicial review cannot be resorted to as an *alter modus* for an appeal. The respondents' right to judicial review is only applicable against the decision of the Appeal Board since the decision of the Appeal Board under sub-s. 36(13) of the TCPA is final and shall be binding on all parties to the appeal or involved in the matter. The decision of the local planning authority is not amenable to judicial review without first exhausting an appeal to the Appeal Board. What more, the so called 'decision' arising out of the State Legal Advisor's letter dated 29 February 2016 which merely informed the respondents' solicitors that no meeting could be held as there was no 'clear executive direction' obtained from the State Government of Selangor. (para 54)

Case(s) referred to:

Ahli-ahli Suruhanjaya Yang Membentuk Suruhanjaya Siasatan Mengenai Rakaman Klip Video Yang Mengandungi Imej Seorang Yang Dikatakan Peguambela Dan Peguamcara Berbual Melalui Telefon Mengenai Urusan Pelantikan Hakim-hakim v. Tun Dato' Seri Ahmad Fairuz Dato' Sheikh Abdul Halim & Other Appeals [2012] 1 CLJ 805 FC ***(refd)***

Everise Sprint (M) Sdn Bhd v. Minister Of Finance, Malaysia & Anor [2015] 7 CLJ 309 CA ***(refd)***

Kijal Resort Sdn Bhd v. Pentadbir Tanah Kemaman & Anor [2015] 3 CLJ 861 FC ***(refd)***

Mersing Omnibus Co Sdn Bhd v. The Minister Of Labour & Manpower & Anor [1983] 2 CLJ 7; [1983] CLJ (Rep) 266 FC ***(refd)***

North East Plantations Sdn Bhd v. Pentadbir Tanah Daerah Dungun & Anor [2011] 2 CLJ 392 CA ***(refd)***

North East Plantations Sdn Bhd lwn. Pentadbir Tanah Daerah Dungun & Satu Lagi [2011] 4 CLJ 729 FC ***(refd)***

Pentadbir Tanah Daerah Seberang Perai Tengah & Anor v. Bagan Serai Housing Estate Sdn Bhd [2016] 8 CLJ 846 CA ***(refd)***

Per Ah Seng Robin And Another v. Housing And Development Board [2016] 1 SLR 1020 ***(refd)***

Ravindran P Muthukrishnan v. Malaysian Examinations Council [1984] 1 CLJ 232; [1984] 1 CLJ (Rep) 320 FC ***(refd)***

Wong Kin Hoong & Anor v. Ketua Pengarah Jabatan Alam Sekitar & Anor [2013] 4 CLJ 193 FC ***(refd)***

Legislation referred to:

Rules of Court 2012, O. 53 rr. 2(4), 3(2), (6)

Town And Country Planning Act 1976, ss. 21(3), (4), (5), (6), (7), 21A, 21B, 21C, 22(2A), 36(13)

A *For the appellant - Kamaruzaman M Arif, Sofiah Omar & Husna Abdul Halim; Selangor Assistant Legal Advisor; M/s Kamaruzaman Arif & Sofiah*
For the respondent - Malik Imtiaz Sarwar, Zamani Ibrahim, JR Tey & Khoo Suk Chyi; M/s JR Tey

[Editor's note: Appeal from High Court, Shah Alam; Judicial Court Review No: BA-25-8-03-2016 (overruled).]
B

Reported by S Barathi

JUDGMENT

Che Mohd Ruzima Ghazali JCA:

C

Introduction

[1] Aggrieved with the decision of the Shah Alam High Court dated 9 November 2017 in allowing the Berjaya Land Berhad's (first applicant/first respondent), Berjaya City Sdn Bhd's (second applicant/second respondent) and Selat Makmur Sdn Bhd's (third applicant/third respondent) judicial review application which essentially sought planning approval for the proposed Berjaya City development and the relocation of the Selangor Turf Club Equestrian and Sports Centre (STC ESC), the State Government of Selangor Director of the Town and Country Planning Department of the State of Selangor (seventh respondent/second appellant) filed this appeal.
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[2] For ease of reference, parties will be referred to as appellants and respondents. Individually, they will be referred to according to the following acronym: Berjaya Land Berhad as 'BLB', Berjaya City Sdn Bhd as 'BCSB', Selat Makmur Sdn Bhd as 'SMSB', the State Government of Selangor as 'SGS' and, Director of the Town and Country Planning Department as 'Director of TCPD'.
F

Brief Background Facts

[3] Selangor Turf Club (STC) is a horse racing club located at Jalan Sungai Besi, Kuala Lumpur and hosts about 30 race days a year, which is a racing season that begins from January to December. Being a horse racing club, STC's activities involves betting and gambling activities.
G

[4] STC decided to relocate its premises situated on H.S. (D) 61790 No: PT 2872, Mukim Petaling Jaya, Wilayah Persekutuan, H.S. (D) 89381 No: PT 22 Sungei Besi, Mukim Petaling, Selangor, and H.S. (D) 50718 No: PT 12812, Mukim Petaling, Selangor (the Sungai Besi Lands) to 21 lots of land in Mukim Sungai Tinggi, Daerah Ulu Selangor, Selangor and 16 lots of land in Mukim Batang Berjuntai, Daerah Kuala Selangor, Selangor owned by BCSB (the Bukit Tagar Lands).
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[5] For that purpose, STC entered into a sale and purchase agreement dated 19 July 2004 (the SPA) with SMSB for the sale of the Sungai Besi Lands. As part of the dealings, SMSB covenanted to relocate STC ESC to the Bukit Tagar Lands.

[6] SMSB is a wholly owned company by BLB and is the beneficial owner of the Bukit Tagar Lands. SMSB was appointed to implement the relocation of the STC ESC. SMSB then appointed BCSB as the turnkey contractor. BCSB had to submit applications for the necessary approvals from the relevant authorities.

[7] The relocation of the STC ESC at the Bukit Tagar Lands by SMSB involves a development of land comprising a racecourse, grandstand and a members' clubhouse on 300 acres of land, equestrian sports centre on 100 acres of land with an additional 50 acres reserved for ancillary structures and 300 acres for residential building of all types. The proposed relocation of the STC ESC will form part of a larger development termed Berjaya City development which comprises of 16,587.23 acres at the Bukit Tagar Lands. The Berjaya City development comprises of mixed development of industrial lots and residential areas.

[8] On 25 May 2005, BCSB through its agent, AJM Planning and Urban Design Group Sdn Bhd (AJM) had submitted to Majlis Daerah Hulu Selangor "Permohonan Kebenaran Merancang bagi Tujuan Tukar Syarat Tanah dan Pecah Sempadan Secara Serentak". On 28 July 2005, AJM on behalf of BCSB also submitted "Cadangan Pindaan Pelan zoning guna tanah" to Director of TCPD for its approval for Berjaya City development including the proposed development of the STC ESC.

[9] Meeting of the State Plaining Committee (SPC) Bil. 2/2005 on 29 September 2005 had agreed to table the Berjaya City development including the proposed relocation of the STC ESC at the National Physical Planning Council (NPPC) for advice and consent. The concept plan proposal for the Berjaya City development which include the proposed relocation of the STC ESC was tabled at NPPC on 8 August 2006, where approval was given but subject to certain conditions, *inter alia*, horse racing activities are strictly not allowed in the proposed Berjaya City development.

[10] Consequently, SPC in a meeting Bil. 1/2008 held on 28 January 2008 *inter alia* made the following decision:

(i) Meluluskan pindaan Pelan Konsep Pembangunan Berjaya City dengan syarat-syarat yang telah ditetapkan oleh Jawatankuasa, mematuhi ulasan terperinci Jabatan Perancang Bandar dan Desa Negeri Selangor, Majlis Daerah Hulu Selangor dan lain-lain jabatan teknikal yang terkilan;

(ii) Mengemukakan semula ke MPFN cadangan pembangunan Pusat Ekuestrian dan Sukan STC.

[11] *Via* a letter dated 11 February 2008, Director of TCPD had informed BLB of the outcome of the SPC's meeting dated 28 January 2008 and instructed BLB to resubmit the latest amended concept plan for Berjaya City development to the TCPD for approval.

[12] Then, comes the General Election and with that a change in the administration of the SGS. The composition of SPC was also changed. In response to the letter from AJM dated 19 February 2008, Director of TCPD *via* a letter dated 20 April 2008 informed AJM that:

(i) TCPD will re-table the SPC's decision dated 28 January 2008 to the next SPC meeting.

(ii) The proposed relocation of the STC ESC will have to be retabled for NPPC's consideration as decided by SPC on 28 January 2008.

(iii) AJM to submit 'Ulasan Jabatan Teknikal' from various departments for the purpose of approval of the amended concept plan.

[13] On 19 August 2008, SPC held a meeting chaired by the new Menteri Besar (MB), YAB Tan Sri Dato' Abdul Khalid bin Ibrahim. After the briefing on the amended concept plan for Berjaya City development, STC decided that:

> Jawatankuasa menangguhkan keputusan terhadap:
>
> i. Pindaan pelan konsep pembangunan Berjaya City;
>
> ii. Permohonan Pusat Ekuestrian dan Sukan STC dalam pelan pembangunan Berjaya City dan seterusnya diangkat semula ke Mesyuarat Majlis Perancangan Fizikal Negara.

[14] In December 2010, BLB appointed the Merdeka Centre for Opinion Research to gather opinion from the public, especially the local residence in Mukim Sungai Tinggi, to determine the acceptability of the relocation of the STC ESC (the Merdeka Centre Report).

[15] Upon application by the respondents, State Executive Council (State Exco) held a meeting Bil. 21/2011 on 14 June 2011 where it was decided that "MMKN ambil maklum dan bersetuju supaya pihak Berjaya melaksanakan skim industri dan perniagaan dahulu dalam pembangunan projek mereka di Hulu Selangor".

[16] As a follow-up, Unit Perancang Ekonomi Negeri (UPEN) had written a letter dated 7 July 2011 to the CEO of BLB stating, *inter alia*, "MMKN telah memutuskan supaya pihak Berjaya Land Berhad untuk melaksanakan skim industri dan perniagaan terlebih dahulu bagi pembangunan projek di Hulu Selangor sebelum cadangan pemindahan tersebut dibawa semula untuk pertimbangan".

[17] Acting and in reliance on the said letter, the BCSB commenced works on the Berjaya City development in 2011. The industrial and business scheme of the Berjaya City development was completed in 2014 with a total expenditure of approximately RM182.73 million.

[18] *Via* letters dated 10 August 2011, 16 August 2011 and 23 January 2014 BLB brought the relocation of STC ESC project to the attention of His Royal Highness (HRH) the Sultan of Selangor. In response, *via* a letter dated 3 June 2014, HRH the Sultan of Selangor gave his support of the project and urged the MB to resolve the matter expeditiously.

[19] Between 2014 and 2015, the respondents continued to engage with the appellants on matters relating to the re-tabling for the approval of the Berjaya City development involving the proposed relocation of the STC ESC. On 17 December 2015, the appellants' solicitors wrote to the MB to request that MMKN review the matter on an urgent basis.

[20] On 21 December 2015, the MB had extended the letter from the respondents' solicitors to the Chambers of the State Legal Advisor (SLA). Thereafter, the respondents' solicitors had communicated with the SLA requesting for a meeting with the MB on an urgent basis. Through a letter dated 22 January 2016, the SLA responded that a meeting could only be fixed once consented by the SGS. *Via* a letter dated 29 February 2016, the respondents' solicitors were informed by the SLA that no meeting could be held as there was no "clear executive direction" obtained from the SGS.

[21] On 21 March 2016, the respondents filed the judicial review application in the High Court against the appellants and six others.

High Court's Findings

[22] In allowing the respondents' judicial review application against the appellants, the learned High Court Judge (LHCJ) found that the respondents have a legitimate expectation that the Berjaya City development including the proposed relocation of the STC ESC would be retabled and approved for implementation. Thus, the failure by the appellants to honour this expectation had resulted in unfairness to the respondents as to amount to abuse of power.

[23] The above decision was made based on the following finding of facts:

(i) At the MMKN meeting on 14 June 2011, approval was given for the respondents to proceed with the implementation of the industrial and business scheme project in Berjaya Land development;

(ii) UPEN's letter dated 7 July 2012 to the CEO of BLB that the SGS will re-table the proposed relocation of the STC ESC if the respondents proceed with the implementation of the industrial and business scheme project first;

(iii) The respondents had been led to believe that by completing the industrial and business scheme which had cost them RM182.73 million, the appellants would retable the proposed relocation of the STC ESC; and

(iv) The appellants had acted unreasonably by failing to retable the proposed relocation of the STC ESC for approval.

[24] Based on the above findings, the LHCJ made the following orders as can be seen in His Lordship's grounds of judgment:

Berjaya City

28. The applicants are allowed to proceed with the development implementation of Berjaya City.

29. The applicants to resubmit all the relevant amended development plan to all the relevant technical departments.

30. The technical departments must give approval with comments within three months from the date they receive the amended plans.

31. If beyond that date of three months the technical department gives no comments, the re-amended plans are considered approved. The Applicants is to name the relevant technical departments in the draft order.

The Construction of The Equestrian

32. The applicants are allowed to proceed with the construction of equestrian centre.

33. The applicants to resubmit all the relevant amended development plan to all the relevant technical department.

34. The technical department must give approval with comments within three months from the date they receive the amended plans.

35. If beyond that date of three months the technical department give no comments, the re-amended plans are considered approved. The Applicants is to name the relevant technical department in the draft order.

Selangor Turf Club

36. The 1st and 5th Respondents is required to re-submit the proposed relocation and development of Selangor Turf Club to Majlis Perancang Fizikal Negara after receiving the fair order.

37. The court also allow prayer (m) against 1st and 5th Defendants. The applicants are ordered to file notice for direction within one month as provided by law.

38. The court also allowed the penal clause as requested to be incorporated in the order. A

39. The cost allowed against the 1st and 5th Defendants are to be taxed.

Our Findings

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[25] The respondents' judicial review application emanated from the proposed relocation of the STC ESC from the Sungai Besi Lands to the Berjaya City development scheme map out at the Bukit Tagar Lands.

[26] To recap, the respondents' application to relocate the STC ESC had gone through all levels of consideration for approval. In the meeting of SPC C on 29 September 2005, it was agreed to table the Berjaya City development including the proposed relocation of the STC ESC at the NPPC for advice and consent. The concept plan for the Berjaya City development which includes the proposed relocation of the STC ESC was tabled at the NPPC on 8 August 2006. Approval was given but subject to certain conditions, *inter* D *alia* that betting and gaming from horse racing activities are strictly not allowed in the proposed Berjaya City development. On 28 January 2008, SPC decided to approve the concept plan of the proposed Berjaya City development subject to the conditions imposed by NPPC. For the proposed relocation of the STC ESC in Berjaya City development, it will have to be E re-tabled to NPPC and as such, the respondents will have to submit the latest amended concept plan to be certified and approved. On 11 February 2008, the Director of TCPD had conveyed the said decision to BLB.

[27] In response to the respondents' application to pursue the Berjaya City development, State Exco in a meeting Bil. 21/2011 held on 14 June 2011 F decided that BLB has to implement the industry and business scheme first in Berjaya City development before the proposed relocation of the STC ESC can be retabled for consideration. On 7 July 2011, UPEN wrote to BLB to inform the State Exco's decision. The respondents commenced works on the Berjaya City development in 2011 and completed the industry and business G scheme circa 2014 with total expenditure of approximately RM182.73 million. Thereafter, the respondents sent a number of correspondences to seek assistance to get the proposed relocation of the STC ESC retabled for approval, including to HRH the Sultan of Selangor and the MB's office. The matter was then referred to the SLA's office. On 29 February 2016 the H respondents were informed by the SLA that no meeting could be fixed as there was no "clear executive direction" from the SGS. The SLA's letter dated 29 February 2016 is a "decision" for the respondents, effectively refusing the retabling for approval of the proposed relocation of the STC ESC. Discontentment with the indecisive attitude of the appellants to retable the proposed relocation of the STC ESC, the "decision" was challenged I under judicial review by the respondents.

[28] The respondents' statement pursuant to O. 53 r. 3(2) Rules of Court 2012 (ROC) stated that:

> 6. Kegagalan Responden-Responden untuk pembentangan semula Kelulusan Pembangunan Berjaya City/STC dan pengabaian mereka mengambil tindakan lanjut bagi membolehkan Pembangunan Berjaya City/STC dilaksanakan adalah satu peninggalan perjalanan kewajipan dan fungsi awam mereka yang memudaratkan Pemohon-Pemohon.

The respondents in their affidavit verifying facts in the statement affirmed that:

> 6.15 Berjaya City telah membelanjakan kos yang besar berjumlah lebih kurang RM182.73 juta untuk memenuhi jangkaan tambahan Responden pertama tersebut dengan melaksanakan 'industrial and business scheme project 'tersebut (yang mana disiapkan pada sekitar tahun 2013), namun begitu, Responden-Responden, terutamanya Responden Pertama, masih tidak menunaikan janji mereka dan masih lagi mengabaikan dan/atau meninggalkan perjalanan kewajipan dan fungsi awam mereka bagi membentangkan semula Kelulusan Pembangunan Berjaya City.

[29] To begin with, learned counsel for the appellants embarks on the issue that the respondents' judicial review was filed out of time and the High Court has no jurisdiction to grant the order. They submitted that from the respondents' applications and leave granted, it is clear that the relief sought was a *certiorari* order to nullify the decision to retable the approval by the SPC. The impugned decision was the Director of TPCD's letter dated 20 April 2008 and the judicial review should have been filed within three months from the date of that letter, but the respondents took eight years to file the judicial review. It is also submitted that there was no decision amenable to judicial review made by the appellants with regard to the approval of the development. In fact, the required technical documents and proposals were yet to be submitted by the respondents to the relevant agencies. The Federal Court's decisions in *Mersing Omnibus Co Sdn Bhd v. The Minister Of Labour & Manpower & Anor* [1983] 2 CLJ 7; [1983] CLJ (Rep) 266; *Ravindran P Muthukrishnan v. Malaysian Examinations Council* [1984] 1 CLJ 232; [1984] 1 CLJ (Rep) 320; *Wong Kin Hoong & Anor v. Ketua Pengarah Jabatan Alam Sekitar & Anor* [2013] 4 CLJ 193; *Kijal Resort Sdn Bhd v. Pentadbir Tanah Kemaman & Anor* [2015] 3 CLJ 861 and Court of Appeal's decision in *Pentadbir Tanah Daerah Seberang Perai Tengah & Anor v. Bagan Serai Housing Estate Sdn Bhd* [2016] 8 CLJ 846 were referred.

[30] Learned counsel for the respondents, *per contra*, submitted that the chronology of events clearly showed that the appellants had effectively decided not to retable the approval on 29 February 2016, that was, when the SLA informed the respondents that no meeting could be fixed as there was

no "clear executive direction" from the SGS. The respondents reiterate that such a refusal can amount to a "decision" within the meaning of O. 53 r. 2(4), ROC which provides:

> Any person who is adversely affected by the decision, action or omission in relation to the exercise of the public duty or function shall be entitled to make the application.

To support their contentions, learned counsel for the respondents referred to the Federal Court's decision in *Ahli-ahli Suruhanjaya Yang Membentuk Suruhanjaya Siasatan Mengenai Rakaman Klip Video Yang Mengandungi Imej Seorang Yang Dikatakan Peguambela Dan Peguamcara Berbual Melalui Telefon Mengenai Urusan Pelantikan Hakim-hakim v. Tun Dato' Seri Ahmad Fairuz Dato' Sheikh Abdul Halim & Other Appeals* [2012] 1 CLJ 805; [2011] 6 MLJ 490, Court of Appeal's decision in *Everise Sprint (M) Sdn Bhd v. Minister Of Finance, Malaysia & Anor* [2015] 7 CLJ 309 and the excerpt from *Judicial Remedies in Public Law* by Sir Clive Lewis (6th edn, 2021).

[31] On the time frame to act, the respondents accepted that the appellants made a clear, unambiguous, and unequivocal promise to retable for approval the proposed relocation of the STC ESC on 20 April 2008. However, subsequently and until 29 February 2016, the appellants represented, expressly and by conduct, that they would do so, and as requested by the appellants, the respondents proceeded to implement the industrial and business scheme first pending the re-tabling of the approval. Learned counsel for the respondents submitted that the SLA's letter informed the respondents that no meeting could be fixed as there was no "clear executive direction" was a clear indication of a refusal. At this point in time, the respondents were adversely affected within the meaning of O. 53 r. 2(4), ROC and the three-month period under O. 53 r. 3(6), ROC commenced from 29 February 2016 when this refusal was communicated. The decision of Singapore Court of Appeal in *Per Ah Seng Robin And Another v. Housing And Development Board* [2016] 1 SLR 1020 was referred and argued to be instructive.

[32] Before we delve further into the issues raised by the parties on whether there is any decision amenable to judicial review made by the appellants with regard to the retabling for approval of the proposed relocation of the STC ESC or whether the respondents are within time to file a judicial review, or whether the LHCJ's is correct in his finding that the respondents have a legitimate expectation that the proposed relocation of the STC ESC from the Sungai Besi Lands to the Bukit Tagar Lands would be retabled and approved for implementation, it would be beneficial to reproduce the relevant facts, evidence, and the relevant law pertaining to the respondents' application for approval of the Berjaya City development and the relocation of the STC ESC.

[33] In brief, it is an undisputed fact that on 25 May 2005, the respondents through BCSB's agent, AJM, had submitted an application under s. 21 of the Town and Country Planning Act 1976 ("TCPA 1976") for planning

permission to Majlis Daerah Hulu Selangor. Further, on the 28 July 2005, AJM also submitted to the Director of TCPD for its approval the proposed amendment to the zoning plan for Berjaya City development. In response, SPC in their meeting Bil. 2/2005 held on 29 September 2005 had agreed to table the respondents' application at the NPPC for advice and consent consistent with sub-s. 22(2A) of the TCPA 1976. On the 8 August 2006, the NPPC in its meeting Bil. 6/2006 chaired by the Prime Minister, had considered the Berjaya City development and the relocation of the STC ESC and accepted the proposal subject to *inter alia*, horse racing activities strictly not allowed in the proposed area. The condition imposed by the NPPC has been informed to BLB *via* a letter from the Director of TCPD dated 11 February 2008. The last two paragraphs of the said letter are as follows:

> Walaupun Jawatankuasa Perancang Negeri Selangor telah meluluskan cadangan pembangunan pusat Ekuestrian dan Sukan Selangor Turf Club (STC) namun cadangan ini perlu diangkat semula untuk pertimbangan Majlis Perancangan Fizikal Negara. Sebagaimana pihak Y. Bhg. Dato'/Tuan telah sedia maklum, Mesyuarat Majlis Perancangan Fizikal Negara Bil. 6/2006 bertarikh 8 Ogos 2006 telah meluluskan cadangan pembangunan ini tetapi tidak membenarkan aktiviti lumba kuda dilaksanakan di tapak cadangan. Bersama-sama ini disertakan sesalinan surat keputusan bil. JPBD.Sel./07/13/00006 (16) bertarikh 27 November 2006.
>
> Dengan ini, pihak Y. Bhg. Dato'/Tuan hendaklah mengemukakan pelan konsep pindaan yang terkini ke Jabatan untuk mendapat perakuan dan kelulusan serta memudahkan proses pelaksanaan pembangunan di kawasan ini kelak.

See encl. 126, Rekod Rayuan Bahagian C (Jilid 3) at p. 137.

[34] Thus, at all material times, the approval of the Berjaya City development at Bukit Tagar Lands was on condition that there is to be no horse racing activities allowed in the proposed development area. The condition has been informed to BLB with a clear instruction that the respondents have to resubmit latest concept plan to the local planning authority for approval. Besides that, the Director of TCPD had also inform AJM to resubmit the amended concept plan for the purpose of retabling the proposed relocation of the STC ESC for the consideration. *Via* a letter dated 20 April 2008 the Director of TCPD had inform AJM as follows:

> Permohonan yang dikemukakan telah disemak dan ulasan Jabatan adalah seperti berikut:
>
> 2.1 Jabatan akan membentangkan semula keputusan cadangan pindaan pelan konsep bil. PG 0406A yang telah diluluskan oleh Jawatankuasa Perancang Negeri Bil. 1/2008 pada 28hb Januari 2008 ke Mesyuarat Jawatankuasa yang akan datang.

2.2 Cadangan pembangunan Pusat Ekuestrian dan Selangor Turf Club (STC) juga perlu diangkat semula untuk pertimbangan Majlis Perancangan Fizikal Negara seperti yang diluluskan oleh Mesyuarat Jawatankuasa Perancang Negeri Bil. 1/2008 pada 28hb Januari 2008.

2.3 Pihak tuan dikehendaki mengemukakan ulasan jabatan teknikal seperti berikut untuk tujuan kelulusan pindaan pelan konsep iaitu:

i. Pentadbir Tanah Daerah (Pejabat Tanah/Daerah Hulu Selangor)

ii. Pentadbir Tanah Daerah (Pejabat Tanah/Daerah Kuala Selangor)

iii. Majlis Daerah Kuala Selangor (MDKS)

iv. Majlis Daerah Hulu Selangor (MDHS)

v. Tenaga Nasional Berhad (TNB)

vi. Jabatan Kerja Raya (JKR)

vii. Jabatan Pengairan dan Saliran (JPS)

viii. Syarikat Bekalan Air Selangor (SYABAS)

ix. Jabatan Alam Sekitar (JAS)

x. Jabatan Pembentungan (IWK)

xi. Jabatan Mineral dan Geosains Selangor (W/P)

See encl. 126, Rekod Rayuan Bahagian C (Jilid 3) at p. 142.

[35] Clearly, the said correspondences show that the respondents were well informed of the conditions imposed by NPPC on the Berjaya City development in particular the proposed relocation of the STC ESC. The respondents were also notified about the requirement to resubmit the amended concept plan of the Berjaya City development to the local planning authority for the purpose of retabling by the SPC to the NPPC for consideration if they wish to pursue the proposal of the relocation for the STC ESC.

[36] As to the evidence, the Director of TCPD's affidavit in reply affirmed by Norazira binti Abd Aziz had explicitly said the following at paras. 21 and 22 of the affidavit:

21. Saya selanjutnya mengatakan bahawa Mesyuarat Jawatankuasa Perancang Negeri Selangor Bil. 1/2008 yang diadakan pada 28.1.2008 dan dipengerusikan oleh Y.A.B. Dato 'Seri Dr. Khir bin Toyo, Menteri Besar Selangor telah bersetuju/meluluskan pindaan Pelan Konsep pembangunan Berjaya City dengan syarat-syarat yang ditetapkan oleh Jawatankuasa serta cadangan pembangunan Pusat Ekuestrian dan Sukan STC. Ini kerana Mesyuarat Majlis Perancang Fizikal Negara Bil. 6/2006 bertarikh 8.8.2006 telah meluluskan cadangan pembangunan ini tetapi tidak membenarkan aktiviti lumba kuda dilaksanakan di tapak cadangan.

> 22. Saya selanjutnya menegaskan bahawa Eksibit P6 secara jelas menyatakan bahawa walaupun Jawatankuasa Perancang Negeri Selangor telah meluluskan cadangan pembangunan Pusat Ekuestrian dan Sukan Selangor Turf Club (STC) namun cadangan ini perlu diangkat semula untuk pertimbangan Majlis Perancang Fizikal Negara. Eksibit P6 juga turut menyatakan pihak Pemohon hendaklah mengemukakan pelan konsep pindaan yang terkini ke jabatan untuk mendapat kan perakuan dan kelulusan.

See encl. 125, Rekod Rayuan Bahagian B (Jilid 2) at p. 91 and exh. P6 is the Director of TCPD's letter dated 11 February 2008 to BLB.

[37] Based on the evidence before the court, and in particular para. 22 of the Director of TCPD's affidavit in reply, the appellants had expressly averred to the fact that the respondents were asked to resubmit their amended plans to the local planning authority in consonance with the requirements of the planning law, that is s. 21 of TCPA 1976. The appellants averments were well supported by the contemporaneous documents in the form of correspondence between the parties.

[38] The question is, has the respondents complied with the condition set by the appellants, that is to resubmit the amended concept plan of the Berjaya City development or proposed relocation of the STC ESC to the local planning authority for further consideration? From the evidence and the contemporaneous documents, we find that there is none. The respondents did not comply with the directions given in the letter dated 11 February 2008 which clearly stated that:

> Dengan ini, pihak Y.Bhg. Dato'/Tuan hendaklah mengemukakan pelan konsep pindaan yang terkini ke Jabatan untuk mendapat perakuan dan kelulusan serta memudahkan proses pelaksanaan pembangunan di kawasan ini kelak.

[39] The law on the directions given by the local planning authority is crystal clear. Under sub-s. 21(3) of the TCPA 1976, the local planning authority may give written directions to the applicant for planning permission. Then, sub-s. 21(4) of the TCPA 1976 put a mandatory burden on the applicant to act on the direction given. The said provision is as follows:

> (4) The applicant to whom any written directions are given under sub-s. (3) **shall amend the plan submitted with his application accordingly and resubmit the plan** within such period or extended period as the local planning authority may specify. (emphasis added)

There is also a deeming provision if the applicant failed to observe the directions given by the local planning authority. The use of the word "shall' in the deeming provision shows the serious effect of noncompliance. Subsection 21(5) of the TCPA 1976 perspicuously provides that:

(5) If the plan is not resubmitted within the specified period or extended period, the application for planning permission shall be deemed to have been withdrawn but the applicant may submit a fresh application.

[40] Back to the appellants' appeal before us, facts and evidence show that the respondents chose not to adhere with the directions given by the Director of TCPD in his letter dated 11 February 2008, that is to submit the amended concept plan to the planning authority for consideration. That being the case, we find that whatever approval as stated in the Director of TCPD's letter dated 11 February 2008 should have expired based on the deeming provision under sub-s. 21(5) of the TCPA 1976. Under the law, the respondents have to submit a fresh application if they wanted to go on with the Berjaya City development or to pursue with the proposed relocation of the STC ESC. There is nothing to stop or prevent them from doing so. Thus, the appellants cannot be said to have sat on the re-tabling the approval application to SPC or to NPPC as alleged by the respondents, since that there is no such application to begin with. Based on that fact alone, definitely the respondents could not have any legitimate expectation on the appellants that the appellants would be obliged or be under public duty to act in their favour.

[41] Furthermore, legitimate expectations cannot and should not, override the express statutory provisions stipulated under the law and in our case, the TCPA 1976, which is specifically passed for the proper control and regulation of town and country planning in Peninsular Malaysia. See this Court majority decision in the case of *North East Plantations Sdn Bhd v. Pentadbir Tanah Daerah Dungun & Anor* [2011] 2 CLJ 392 where the subject matter revolves around the issue of revocation of the alienation of the state land by the State Authority. The said majority decision was affirmed by the Federal Court in the case of *North East Plantations Sdn Bhd lwn. Pentadbir Tanah Daerah Dungun & Satu Lagi* [2011] 4 CLJ 729. The apex court held that:

[29] Kami juga berpendapat bahawa keputusan majoriti Mahkamah Rayuan adalah tepat apabila dinyatakan 'Whether or not the doctrine of legitimate expectation applies depends on the facts of each case, it cannot and should not override the express statutory power vested in the State Authority.'

[42] Based on the clear provision enacted under the TCPA 1976, the respondents who desire to have the planning permission approved, have to make a proper application to the local planning authority. The rights, duties and liabilities of the respondents as applicants for planning permission were exhaustively spelt out under the TCPA 1976. The respondents are compelled to fulfil all directions given by the planning authority to complete the process of the approval. Legitimate expectations cannot override the express statutory provisions of the code. The respondents have no legitimate

expectation of the planning permission until and unless they have fulfilled all requirements under the law. Thus, we are of the considered view that the LHCJ had erred in his decision on the issue of legitimate expectation.

[43] Looking at another perspective, we would also agree with learned counsel for the appellants contention that the High Court Order dated 9 November 2017 had effectively approved the Berjaya City development by circumventing the TCPA 1976. In the High Court Order that can be seen at encl. 78, at pp. 23 to 28 Rekod Rayuan Bahagian A (Jilid 1), para. 3 of the said Order clearly shows that the LHCJ had stepped into the shoes of the executive in approving the development defying all requirement, including the mandatory procedural requirements, and processes spell out under ss. 21, 21A, 21B and 21C of the TCPA 1976. The declaration ordered by the LHCJ in the said paragraph is as follows:

> 3. Adalah dengan ini diisytiharkan bahawa pemohon-pemohon dibenarkan untuk meneruskan dengan pembangunan Berjaya City dan Pusat Ekuestrian.

[44] Obviously, the declaration order that allow the respondents to continue with the Berjaya City development and the Equestrian Centre has the effect of ousting the statutory powers of the local planning authority to evaluate and to make decision on the respondents' planning permission application. It removes the right of the relevant government departments and agencies to give comments on the proposed development. Last but not least, it also defies the right of objection to the neighbouring land owner to the development as prescribed under sub-s. 21(6) and (7) of the TCPA 1976. Hence, the High Court Order should not be allowed to stand and had to be set aside *ex debito justitiae*.

[45] Now, we move to learned counsel for the respondents' submission and the LHCJ's finding that the respondents' legitimate expectation stem on the approval given by the State Exco's approval on 14 June 2011 and UPEN's letter dated 7 July 2011. The LHCJ in his grounds of decision at para. 20 had opined that:

> 20. Based on the letter from the office Selangor State Secretariat dated 7/7/212, the Applicants proceeded to develop the industrial and business scheme on the promise by the 1st Respondent to re-table the relocation project if the Applicants proceeded with the implementation of the industrial and business scheme project first. The fact that the Applicants had in fact acted and relied on that promise is clear on the evidence before this Court. The Applicants had spent about RM182.3 million to develop the said industrial and business scheme. The project was completed in 2014. Based on this facts, I find that the Applicants did in fact have a legitimate expectation that the relocation project would be re-table and approved for implementation. Thus the failure of the 1st and 5th

Respondents to honour the expectation, under the circumstances, resulted in the unfairness to the Applicants as to amount to abuse of power. (See the following cases *Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggongan* [1999] 3 CLH 65, *R v. North and East Devon Helath Authority; Ex Parte Coughland* [2001] QB 213; *Preston v. Inland Revenue Commissioners* [1985] 2 All ER 327, *Ng Siu Tung & Others v. Director of Immigration* [2002] HKLRD 561 and *R (Bibi) v. Newham LBC* [2002] 1WLR 237.)

[46] First and foremost, we have to look at the respondents' conduct in dealing with the planning permission of the Berjaya City development and the proposed relocation of the STC ESC. In spite of submitting the amended plan for planning approval by the local planning authority as was informed by the Director of TCPD in the year 2008, the respondents had directed their application direct to the SGS to move on with the Berjaya City development. Upon the respondents' application, the State Exco in a meeting Bil. 21/2011 held on the 14 June 2011 had decided that:

Majlis Mesyuarat Kerajaan Negeri mengambil maklum dan bersetuju supaya Pihak Bejaya melaksanakan skim industri dan perniagaan dahulu dalam Pembangunan projek mereka di Hulu Selangor.

The State Exco's decision was conveyed to BLB *via* a letter dated 7 July 2011 issued by UPEN. The contents of the UPEN's letter titled "Cadangan Pemindahan Pusat Ekuestrian Dan Sukan Selangor Turf Club (STC) Sungai Besi Ke Sungai Tinggi, Hulu Selangor" are as follows:

2. Sukacita dimaklumkan bahawa Majlis Mesyuarat Kerajaan Negeri (MMKN) mengambil maklum cadangan pemindahan Pusat Ekuestrian Dan Sukan Selangor Turf Club (STC).

3. Namun demikian, MMKN telah memutuskan supaya pihak Berjaya Land Berhad untuk melaksanakan skim industri dan perniagaan terlebih dahulu dalam pembangunan projek di Hulu Selangor sebelum cadangan pemindahan tersebut dibawa semula untuk pertimbangan.

4. Tindakan dan perhatian dari pihak Y.Bhg. Dato'/Tuan amat dihargai dan didahului dengan ucapan terima kasih.

[47] Based on the said decision, the respondents submitted planning permission for the industrial and business scheme in the Berjaya City development. Majlis Daerah Hulu Selangor, the local planning authority, had approved the planning permission *via* plan no. MDHS/TP/93/2012 dated 2 November 2012. See para. 31 of the Director of TCPD's affidavit in reply in encl. 125, Rekod Rayuan Bahagian B (Jilid 2) at p. 94. It is relevant to note that the planning permission at that material time is only limited to the development of the industrial and business projects in the Berjaya City development and not for the proposed relocation of the STC ESC.

[48] From the UPEN's letter, it is obviously stated that the State Exco had decided that the respondents have to implement the industrial and business scheme in the Berjaya City development first before the proposed relocation of STC ESC can be reconsidered. For the purpose of reconsideration or in the word used by the respondents as 'retabling' the proposed relocation of STC ESC Bukit Tagar Lands, the respondents have to follow the normal steps and processes stipulated under the TCPA 1976. Under the law, the burden is on the respondents and not the appellants to make an application for planning approval in order to move the local planning authority to take further steps to consider the application. There is no reason to assume that all requirements stipulated under the law have been superseded by the UPEN's letter dated 7 July 2011. Therefore, we find that the LHCJ's finding on this issue is totally erroneous.

[49] On the same matter in question, we had to agree with learned counsel for the appellants contention that despite being notified by the Director of TCPD to submit an amended plan to the local planning authority for approval in the year 2008 with an undertaking that there will be no horse racing activity, the respondents did not comply with such instructions. On the contrary, the respondents took steps outside the ambit of the TCPA 1976 in an attempt to push through its proposed relocation of the STC ESC. The respondents had sent letters to HRH the Sultan of Selangor for blessing and support to implement the proposed relocation of the STC SCE. As a result, the private secretary to HRH Sultan of Selangor had written a letter dated 3 June 2014 to the MB Selangor stating the palace's support for the proposed relocation of the STC SCE. See encl. 127, Rekod Rayuan Bahagian C (Jilid 5) at pp. 108 and 109.

[50] At around the same time, the respondents also sent letters to the MB. Finally, *via* a letter dated 17 December 2015, respondents' solicitor had issued an ultimatum demanding an immediate action by the State Exco to review the matter on an urgent basis and to issue an executive and administrative directive to the relevant state departments or agencies to implement the development approval dated 11 February 2008. See encl. 127, Rekod Rayuan Bahagian C (Jilid 5) at pp. 113 to 118.

[51] Upon receiving the letter from the respondents' solicitor, the MB referred the matter *via* a letter dated 12 January 2016 to SLA for further action. The said MB's letter was also copied to the respondents' solicitor. See encl. 127, Rekod Rayuan Bahagian C (Jilid 5) at p. 131. From there on, solicitor for respondents had written two letters to SLA asking for an appointment with the MB. The last letter sent by solicitor to SLA dated 20 January 2016 and the SLA replied *via* a letter dated 22 January 2016 as follows:

2. Setelah meneliti perkara di atas, pihak kamar akan memaklumkan tentang perjumpaan dengan pihak tuan setelah mendapat persetujuan Kerajaan Negeri.

[52] Dissatisfied with the SLA negative reply, the respondents initiate the judicial review. From the facts and the evidence delineated above, and the law that governs the application for planning approval, it is clear that the respondents were barking at the wrong tree. Having not submitted any amendment plan to the local planning authorities according to sub-s. 21(4) of the TCPA 1976 after their planning permission was approved with conditions in year 2008, the respondents were hoping to shift their obligation imposed under the law to the appellants. The SLA or the appellants are not the decision maker that can decide on the planning approval. Therefore, we are of the considered view that their refusal or omission to assist the respondents in retabling the application to get approval for the proposed relocation of the STC ESC is not a 'decision' that is amenable to judicial review.

[53] Finally, the procedural steps and processes that had to be undertaken by an applicant, in our case the respondents, in applying for planning permission as spelt out under ss. 21, 21A, 21B and 21C of the TCPA 1976 is not a common law procedure but a creature of statute. According to the scheme of law under the TCPA 1976, the local planning authority had to treat the application as soon as possible after the receipt of the application and have to deal with the application and make a decision as stipulated under s. 22 of the TCPA 1976. An applicant for planning permission aggrieved by the decision of the local planning authority to refuse planning permission or by any condition imposed by the local planning authority in granting planning permission, and a person who has lodged an objection pursuant to sub-s. 21(6) of the TCPA 1976 and is aggrieved by the decision of the local planning authority in relation to his objection, can file an appeal to the Appeal Board set up under s. 36 of the TCPA. The filing of such appeal is within one month from the date of the communication of such decision.

[54] Therefore, an appeal against the decision of the local planning authority is also a creature of statute and any remedy sought by the aggrieved party will have to lie according to the right given under the statute. The scope of judicial review is narrower and limited if a statute gives such a right. When no appeal lies from a decision by local planning authority, judicial review cannot be resorted to as an alter modus for an appeal. The respondents' right to judicial review is only applicable against the decision of the Appeal Board since the decision of the Appeal Board under sub-s. 36(13) of the TCPA 1976 is final and shall be binding on all parties to the appeal or involved in the matter. Applying to the facts in the appeal before us, the law is clear that even the decision of the local planning authority is not amenable to the judicial review without first exhausting an appeal to the Appeal Board. What more,

A the so called 'decision' arising out of the SLA's letter dated 29 February 2016 which merely informs the respondents' solicitors that no meeting could be held as there was no "clear executive direction" obtained from the SGS.

Conclusion

B **[55]** Based on the reasons adumbrated above, we unanimously find and held that there are merits in the appellants' appeal which warrant appellate intervention. We allow the appellants' appeal with costs. The order of the High Court is set aside. We award costs of RM20,000 to the appellants here and below subject to the allocator.

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